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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CRESCENZIO RAMIREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JULIUS LUCIUS ECHELES
30 North LaSalle Street
Chicago, Illinois 60602
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 12, ILL. LAkeview 5-6581

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, the Chief Justices and Associate Justices of the Supreme Court of the United States

Your petitioner, Crescenzio Ramirez, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on September 21, 1966.

JUDGMENT AND OPINION OF THE COURT BELOW

On September 21, 1966, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of conviction entered in the United States District Court for the Northern District of Illinois, Eastern Division, sentencing defendant to a term of ten years imprisonment. No opinion was rendered by the District Court. The Opinion of the Court of Appeals has not as yet been reported, but is reprinted here as Appendix A.

JURISDICTIONAL STATEMENT

On a jury trial, petitioner was convicted of possession of 2.07 grams of heroin and on a second count, that he aided and abetted one Louis Gutirrez in facilitating the transportation of 5.17 grams of heroin in violation of Title 21, United States Code, Section 174.

On appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed by an Opinion filed September 21, 1966 (Appendix A).

This petition is filed within thirty days from the date of the Opinion.

The jurisdiction of this court is invoked under the provisions of Title 18, U.S. Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. When a defendant is charged with possessing a small quantity of narcotics—2.07 grams of heroin—and where it was charged that he aided and abetted another who possessed a small quantity of narcotics—5.17 grams of heroin—and where the government relied on the theory of constructive possession of narcotics on the part of the de-

fendant, was it not prejudicial error for the prosecutor to tell the jury that the defendant was "ready to make a sale, if possible" where there was no evidence in the record to justify such assertion? Under the circumstances, was it not error for defendant's motion for a mistrial made at that point to be overruled?

2. Where the evidence showed that the defendant was arrested after he stopped his car near another car and then fled in his automobile and that there was found under the floor mat a small quantity of narcotics—2.07 grams of heroin, which a co-defendant had testified the co-defendant had thrown there, and where there was no evidence that individuals in the automobile near which the defendant had paused momentarily were narcotic addicts, was it not error for the prosecutor to tell the jury that the other car contained "two known narcotic addicts" where there was no intention on the part of the prosecutor so to prove, and where there was no proof offered by the prosecutor in support of his statement?

STATEMENT OF THE CASE.

Evidence on Behalf of the Government.

Chicago police officer Bernard Brown testified that on June 30, 1965, at about 6:30 P.M. he and federal narcotic agent Bernard Coulter were in the company of police officers Nicoletti and Hernandez. They rode in an unmarked car to Wood and California Streets in Chicago and parked near a 1957 black Buick in which a man and woman were sitting; then the witness backed up his car about 150 feet behind the Buick. At about 8:30 he saw a 1965 green Chrysler driven by defendant pull alongside the Buick. It stopped for a matter of seconds, then pulled off at a high rate of speed and made a right turn on Cullerton Street. The witness immediately pursued. About halfway down the block on Cullerton Avenue between Wood and Paulina Streets the passenger, Gutirrez,[1] jumped out of the car and threw a tinfoil package to the street. Agent Coulter ran after Gutirrez. The Chrysler pulled off again and the witness pursued it until he curbed the car at Wood and 19th Streets. He identified himself to defendant, and as Ramirez got out of the car he started to reach under the front seat. The witness told him not to do that and ordered him to come forward (A. 3-4). When agent Coulter arrived he told Coulter there must be something under the front seat. When Counter searched the car he found a tin foil package of brown powder which he said he found under the floor mat where the driver sat (A. 4).

[1] Gutierrez was petitioner's co-defendant at trial. At the conclusion of the government's case, he pled guilty, and then testified on behalf of petitioner.

The defendant denied knowing that there were any narcotics in the car (A. 4).

Federal narcotic agent Bernard Coulter testified about the events in the same manner as did officer Brown up to the time when Gutirrez jumped out of the Chrysler automobile (A. 5). Then Coulter jumped from his car and recovered the object which Gutirrez threw on the street. It contained a brown powder. The witness ran after Gutirrez and caught him at Cullerton and Wood Streets. Gutirrez was turned over to officer Hernandez and then the witness went to where Brown had curbed the car of Ramirez. He went to the driver's side of the Chrysler and found an aluminum foil package containing a brown powder substance under the floormat approximately 6 inches from the driver's seat, or about 10 inches from the door of the vehicle on the driver side (A. 6).

When officer Hernandez brought Gutirrez to the scene, Gutirrez admitted that the heroin which Coulter picked up from the street was his. He also stated that the heroin found in the car was his (A. 6).

Coulter testified he did not submit the package found in the car to any laboratory for any fingerprint examination (A. 7-8).

A stipulation was read into the record.

Evidence on Behalf of Defendant.

Louis Gutirrez testified he had been in the penitentiary from 1957 to 1959. He was a narcotic addict and used heroin. He knew the defendant since 1960. At about 8:30 P.M. on June 30, 1965, he was drinking in a tavern at Paulina and Cermak Road. He saw the defendant there and asked defendant to give him a lift because he wanted

to buy a small car. While on the way north, he saw a friend of his in a car on the corner of Wood and Cullerton. Then they drove adjacent to the automobile and he told Ramirez to leave him there. Just about this time he saw some police officers, and since he had two papers of heroin with him, about which defendant knew nothing, "I got kind of panicky and threw one in the car and opened the door and got out . . ." (A. 9-10). He started to run and threw the paper (package). He was arrested by agent Coulter; another officer took him to where the defendant was being held. "They then started searching the car. They said they have found—I thrown the heroin that was in the car, it was mine I told them. I had two packs and I have thrown one." (A. 9).

"Well, I told this agent, I told him that the heroin was mine, and he said—first I told him that the one he had caught on me and the one that was on the corner, they were mine, he said 'Who do you think they're going to believe, me, that I am a government agent, or you that you are an addict?' I told him, 'What do you want to involve an innocent man? Chris [the petitioner] didn't know anything about it.' He said, 'No, I am taking you both in,' and he just took us in." (A. 9).

Gutirrez said that defendant had no knowledge that the witness had heroin with him. All the heroin belonged to him (A. 9). When he threw the one package in the car he threw it in the middle where there was a ball transmission. "It probably hit there, right there, and when down somewhere around his feet or something." (A. 11). He never mentioned anything to the defendant about heroin, nor did he ever talk with the defendant about heroin (A. 11).

(After giving this testimony Gutirrez pled guilty and was withdrawn from the case. A. 10).

Prosecutor's Opening Statement to the Jury.

"I expect that the evidence in the case will show that officer Bernard Brown of the Chicago Police Department, narcotics detail and agent Coulter, who sits there, both of whom by the way will testify, both men of long experience in the fight against the narcotics traffic. . . ."

(Defense objection to this statement as argumentative was overruled. (A. 2).)

The prosecutor continued, saying:

"They were engaged in the course of investigation on June 30, 1965; that after receiving certain information they were parked in the vicinity of Cullerton and Woods Street, Chicago, Illinois; that two other police officers, officer Hernandez and Nicoletti had concealed themselves in the back seat of an automobile parked in that vicinity, occupied by two known narcotic addicts; that the defendants Crescenzio Ramirez, driving a 1965 Chrysler automobile, and accompanied by the defendant Gutirrez, drove up to that parked vehicle containing the two addicts and two police officers, stopped the car, the Chrysler . . ." (Defense motion for a mistrial was overruled. (A. 2).)

Prosecutor's Closing Argument.

"Now I submit, ladies and gentlemen, that they told you that they approached that parked '57 Buick with the two persons in it, that the defendant Ramirez and the defendant Gutirrez were ready to make a sale, if possible; that when they saw the police officers—

Mr. McDonnell (Defense Attorney) I object to that your Honor. There is no evidence on this. This is pure speculation and not founded on the evidence and it is objectionable and I am asking the court to declare a mistrial at this time." (A. 12).

The court overruled the objection and denied the motion for mistrial. (A. 12).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

The prosecutor improperly advised the jury that petitioner was attempting to make a sale of narcotics.

The decision by the Seventh Circuit (Appendix A) is in direct conflict with decisions of the Second Circuit, *United States* v. *Bugros*, 304 F.2d 177 (1962), the Third Circuit, *United States* v. *Brandenburg*, 155 F.2d 110 (1946) and the Tenth Circuit, *Towbin* v. *United States*, 93 F.2d 861 (1938). Those cases held directly contrary on a similar set of facts. Those cases were brought to the attention of the Seventh Circuit Court of Appeals, but the Opinion does not distinguish, explain, differentiate or discuss those cases. (Appendix A).

The entire theory of the government's case was that defendant had illegal possession of narcotics—and constructive possession at that. (See court's instructions, A. 17-18). The court erred in denying defendant's motion for a mistrial. As was set out in the Statement of Facts, it is beyond argument that there was any proof that defendant ever had actual possession of the narcotics. The court gave a series of instructions on constructive possession (A. 17-18). There was no proof anywhere in the record, as argued by the prosecutor to the jury, "*. . . that the defendant Ramirez and the defendant Gutirrez were ready to make a sale, if possible . . .*" (A. 12).

In addition, the prosecutor decided to prejudice the defendant at the outset by advising the jury that the two

arresting officers were "both men of long experience in the fight against the narcotics traffic" (A. 2). In his opening statement, also, the prosecutor improperly told the jury that the defendant had parked his car alongside one "occupied by two known narcotic addicts" (A. 2), knowing that he could not introduce into evidence such fact, if it be a fact.

It appears from the record that the prosecutor was not content to allow the jury to decide the issues on the state of the evidence. Even assuming that there was sufficient evidence by which a jury could conclude the defendant was guilty of "constructive possession" of the small quantity of heroin, the case was nonetheless a close one. In a case of this kind where the onus on a defendant is so great to begin with, and where the evidence, taken at its best is weak the trial should be free from contaminating error of the kind deliberately injected by the prosecutor.

The error was compounded when the trial judge denied defendant's motion for mistrial made at the time when the prosecutor uttered his unwarranted prejudicial assertions of a sale (A. 12). Thus, the argument of the prosecutor had the imprimatur of the trial judge's permissiveness. No one knows how the receipt of this argument might have affected the jury.

In *United States* v. *Brandenburg,* 3 Cir., 155 F.2d 110 (1946), the court reversed the conviction of a doctor charged with dispensing narcotics not in good faith in violation of the Harrison Narcotics Act, notwithstanding that there was sufficient evidence for conviction because of the large quantities of morphine sulphate prescribed to patients. Among the prescriptions offered into evidence by the government were three which were attached to sheets

of paper and pinned together. The Third Circuit stated, p. 113:

> "These bore legends, evidently drafted by government agents, and to the effect that the prescriptions 'were purchased' from Dr. Brandenburg and 'post dated'. Neither counsel noticed these legends. Casual inspection by defense counsel before they went into the evidence did not reveal the typewritten and hearsay statements. It was not until several days after the jury returned its verdict that appellant's counsel first noticed the existence of the legends. He then brought the matter before the trial judge on motion to set the verdict aside. The court denied the motion. In this we think he erred. *United States* v. *Dressler*, 7 Cir. (1940), 112 F.2d 972 and *cf. United States* v. *Michener*, 3 Cir., 1945, 152 F.2d 880, 885. Obviously, these hearsay statements might have been influential in the jury's determination of the vigorous contested question of Dr. Brandenburg's faith. And on appeal, we are unable to evaluate what weight the jury attached to them. *United States* v. *Michener, supra.* Therefore, a new trial must be had."

And again, we call to the court's attention that the error in *Brandenburg* was considered to be plain error, there having been no objection made at trial time before verdict was reached. Here, the objection was instantaneous.

In *Towbin* v. *United States*, 10 Cir. 93 F.2d 861 (1938) another physician was convicted of violating the Federal narcotic laws by unlawfully dispensing narcotics. The evidence established he administered narcotics to patients. And the government's proof there made references in the direct examination of the narcotic agents to the fact that the office of the doctor had been under observation and that two individuals visited it who had recently pleaded guilty. The prosecutor asked whether these individuals were known addicts. The Tenth Circuit said, p. 869:

> ". . . even though that question went unanswered, all considered together were reasonably calculated to create in the minds of the jury the belief that such persons had some illicit connection with appellant respecting the sale and disposition of narcotics—perhaps as purchasers of the quantities described in the indictment or as a general outlet; *and bearing in mind the prejudice commonly existing against one who is known to engage in the illicit sale and dispensation of morphine, it cannot be said that the effect was harmless.* On the other hand, it was prejudicial. Subtle suggestions, references and innuendoes of a prejudicial nature which have no basis of fact are sometimes fatal to a trial and cannot be sanctioned." (Emphasis added.)

It seems clear that all courts recognize that because the onus on the defendant charged with a narcotics violation is great in the eyes of a jury, notwithstanding the presumption of innocence, the record should be free from suggesting to the jury that the defendant committed more serious narcotic offenses than the proven evidence showed him to have committed.

The argument here was more prejudicial than that which caused the reversal of the narcotic conviction in *United States* v. *Bugros,* 2 Cir., 304 F.2d 177 (1962). There, it appeared that when officers went to the home of the defendant to arrest him, they found cocaine under some toys in the drawer of a child's chest of drawers. Defendant was tried with one Morales who plead guilty during the trial. It was Bugros' contention that the packages belonged to Morales; that he did not know they contained cocaine. In summation, the prosecutor alluded to the place of hiding in the child's dresser under children's toys and added, "To me, ladies and gentlemen, this is not only concealment, this is a total reckless disregard of the wel-

fare of children considering their propensity and curiosity and considering the habits of children" (p. 178). Defense counsel moved for mistrial which the judge denied, "with the admonition that the jury should disregard the remarks of the assistant United States Attorney." A few minutes later, the prosecutor again mentioned that the cocaine was found, ". . . not in the kitchen, not in his bedroom, not in the living room, but in a child's room." Again, defense counsel moved for a mistrial which the court denied, but stated, "I assume that there is no studied attempt to prejudice the jury in any way. It was a fact that the material was found in the child's bedroom. Aside from that, the jury should give it no special weight or significance" (p. 179).

The Second Circuit, Chief Judge Lumbard, in reversing, stated, p. 179:

> "It is the prosecutor's obligation to avoid arguments on matters which are immaterial and which may serve only to prejudice the defendant. It is his duty above all else to be fair and objective and to keep his argument within the issues of the case. There was no need to make any reference to the welfare of children, their propensities and habits. The only question at issue was whether Bugros knew what was in the packages. We cannot condone the deliberate and unnecessary references to an immaterial detail. The nature of the prosecutor's references showed that his purpose could only have been to suggest that the defendant was a contemptible person who was unconcerned with the possible danger to his own children. To repeat the reference after the judge's admonition was inexcusable. *The unfair, unwarranted and reprehensible summation deprived the defendant of the fair trial which is his right, regardless of how clear his guilt may seem or how strong the proof against him.* Arguments such

as those made in the prosecutor's summation should be beneath the dignity of a representative of the government of the United States as they are incompatible with the proper administration of criminal justice. *Berger* v. *United States*, 295 U.S. 78, 66 S.Ct. 629, 79 L.Ed. 1314 (1935)." (Emphasis added.)

Reversal came in the face of the trial judge's admonishments to the jury at the time when the errors occurred. Contrast the lack of any remedial admonitions in the case at bar.

CONCLUSION

The opinion below presents an unprecedented expansion of permissiveness in narcotic prosecutions. And it expresses opinions contrary to those of the Second, Fourth and Tenth Circuits as pointed out.

We pray that your Honors will consider this a fit case to warrant this Court's intervention.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 15609 SEPTEMBER TERM AND SESSION 1966

UNITED STATES OF AMERICA, *Appellee,* v. CRESCENZIO RAMIREZ, *Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

September 21, 1966

Before HASTINGS, *Chief Judge,* DUFFY, *Senior Circuit Judge,* and CUMMINGS, *Circuit Judge.*

DUFFY, *Senior Circuit Judge.* Defendant was indicted on two counts. In Count 1, it was charged that he did receive, conceal, buy, sell and facilitate the transportation of 2.07 grams of heroin after it was imported into the United States, knowing the same was imported contrary to law, and, in Count 2, that he aided and abetted one Louis Gutirrez who did receive, conceal, buy, sell and facilitate the transportation of 5.17 grams of heroin in violation of Title 21, United States Code, § 174.

After a trial to a jury, defendant was found guilty on both counts. Concurrent sentences of ten years were imposed.

On this appeal, defendant claims there was insufficient evidence to justify the verdict. Error is also asserted because of statements by the Government prosecutor in both his opening statement and in the argument to the jury.

On June 30, 1965, three Chicago police officers and a federal narcotic agent drove in an unmarked police car to Wood and Cullerton Streets in the City of Chicago, parking near a 1957 black Buick in which a man and woman were seated. About two hours thereafter, a 1965 green Chrysler automobile driven by the defendant pulled up alongside the Buick. After a few seconds, the Chrysler was driven off at a high rate of speed. The police car followed in pursuit. On Cullerton Avenue Gutirrez, who was a passenger in the car driven by the defendant, jumped out of the car and threw a tinfoil package to the street. This package was picked up and proof was made that it contained a brown powder identified as heroin. While the federal agent was pursuing Gutirrez, the police car curbed the Chrysler automobile at Wood and Nineteenth Streets.

As the defendant was about to get out of the Chrysler at the direction of police officer Brown, he attempted to reach under the front seat. Brown ordered him to come forward, and when agent Coulter arrived, Brown told him there must be something under the front seat. Coulter searched and found a tinfoil package containing brown powder which, when discovered, was under the floor mat of the automobile and near the driver's seat. The contents of the package were identified as heroin.

During the course of the trial, Gutirrez withdrew his plea of not guilty and entered a plea of guilty. He testified that all of the heroin that was in the car belonged to him. It is apparent the jury did not believe such a statement.

Considering the evidence most favorable to the Government, as we must, on this appeal, including the location of the heroin in the defendant's car, and his behavior when being chased and finally stopped by the police, we have no difficulty in concluding that the evidence was sufficient to support the verdict and judgment of guilty, and we so hold.

We now consider the allegations of error in the statements of the prosecutor. In his opening statement, Government counsel told the jury that the arresting officers were "both men of long experience in the fight against the narcotics traffic." He also stated that two police officers were concealed in the back seat of the Buick while the front seat was occupied by two known narcotic addicts. In addition, he argued to the jury that the two defendants were ready to make a sale, if possible.

Defendant's complaint that there was no specific evidence that he and Gutirrez were ready to make a sale, does not establish that there was reversible error in this respect. The statement was a permissible interpretation by counsel from the testimony that was properly before the jury. We hold there was no error in this respect.

Defendant relies, to a considerable extent, on the case of *United States* v. *Bugros*, 304 F.2d 177 (2 Cir. 1962). In that case, the Government prosecutor, in his summation, twice referred to the fact that narcotics had been

found in a drawer in a child's bedroom. Although the trial judge instructed the jury to disregard these remarks, the conviction was reversed. In that case, however, the prosecutor attempted to interject "an immaterial detail" to the prejudice of the defendant. In the present case, the prosecutor suggested a reasonable interpretation of all the evidence for the jury's consideration. The defense, of course, was free to suggest other interpretations. Thus, the Government's summation was permissible and clearly not of the same character or purpose as the argument held improper in *Bugros*.

We hold there was no error in stating that two of the police officers had had experience in the fight against the narcotic traffic. In view of the admonitions of the Court to the jury that statements of counsel were not evidence, as well as the statement of the Government's attorney to the same effect, we hold there was no prejudicial error in this respect. The prosecutor's statement to this effect occurred only a few moments before the comment describing the people in the parked car. Of course, the Judge's admonition came just before the jury began its deliberations. In the light of these protective measures, and under all the circumstances of this case, we hold that no reversible error has been shown.

The judgment of the District Court is

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 707

CRESCENZIO RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1966. The petition for a writ of certiorari was filed on October 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner should have been granted a mistrial because of certain comments made by the prosecutor in his opening statement and closing argument.

268-470—66——1

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the Northern District of Illinois on two counts of concealing and facilitating the transportation of heroin in violation of 21 U.S.C. 174, and in aiding the commission of a similar offense by his co-defendant Gutirrez. On February 18, 1966, petitioner was sentenced to imprisonment for ten years on each count, the sentences to run concurrently. The court of appeals affirmed the conviction.

1. The evidence showed that on June 30, 1965, at about 8:00 or 8:15 p.m., three police officers and federal narcotics agent Coulter, driving in an unmarked squad car, saw a man and a woman in a parked Buick. After the officers had conversed with the occupants, two of them concealed themselves in the back seat of the automobile. The other officer and agent Coulter parked their squad car some distance away. An officer testified that they were waiting for the arrival of a 1965 green Chrysler (Tr. 12–15).[1] At about 8:25 p.m., a 1965 green Chrysler, driven by petitioner with Gutirrez as a passenger, stopped beside the Buick. After a few seconds, it sped rapidly away around a corner (Tr. 16, 62–63). The squad car immediately followed in pursuit. The Chrysler stopped momentarily, after turning the corner. Gutirrez jumped out, threw a shiny package to the pavement, and began to run. Agent Coulter left his car, retrieved the package, and apprehended Gutirrez not far away (Tr. 65–66). After he turned Gutirrez over to two of the

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which we are lodging with the Clerk of the Court.

officers, Coulter proceeded to where the third officer had succeeded in curbing the Chrysler, with petitioner still in the driver's seat (Tr. 66–67). The officer told Coulter that he had seen petitioner start to "reach in under the front seat" (Tr. 22) before petitioner was ordered to get out of the car, and that he therefore suspected there must be something hidden there. Coulter lifted the floor mat and found a second package of heroin approximately six inches from the driver's seat (Tr. 69–70). A few minutes later the other two officers arrived with Gutirrez, who stated that he was the owner of both packages of heroin (Tr. 72, 128), and that petitioner had no knowledge of his possession of the narcotics (Tr. 131–132).

Gutirrez testified that he was an addict (Tr. 124), that the packages of heroin were his, and that he had thrown one of the packages back into the automobile driven by petitioner, surmising that it landed "somewhere around his [petitioner's] feet" (Tr. 145–146). At the close of trial, he changed his plea to guilty.

2. In his opening statement the prosecutor referred to agent Coulter and another officer as "men [of] long experience in the fight against the narcotics traffic" (Tr. 4). An objection to the comment as argumentative was overruled (*ibid*). The prosecutor continued, saying:

> * * * They were engaged in the course of investigation on June 30, 1965; that after receiving certain information they were parked in the vicinity of Cullerton and Woods Street in Chicago, Illinois; that two other police officers * * * had concealed themselves in the

> back seat of an automobile parked in that vicinity, occupied by two known narcotic addicts;
>
> That the defendants, Crescenzio Ramirez, driving a 1965 Chrysler automobile, and accompanied by the defendant Gutirrez, drove up to that parked vehicle containing the two addicts and two police officers, stopped the car, the Chrysler——

At this point defense counsel moved for a mistrial; the motion was denied (Tr. 5).

In his summation to the jury the prosecutor said (Tr. 161):

> Now I submit, ladies and gentlemen, that they told you that they approached that parked '57 Buick with the two persons in it, that the defendant Ramirez and the defendant Gutirrez were ready to make a sale, if possible; that when they saw the police officers——

The defense again moved for a mistrial; that motion was also denied (Tr. 161).

ARGUMENT

Petitioner urges that three statements of the prosecutor—that the investigating officers were "men [of] long experience in the fight against the narcotics traffic," that the occupants of the parked vehicle were "known narcotics addicts," and that petitioner and his co-defendant Gutirrez "were ready to make a sale, if possible"—constitute error warranting review by this Court.

The court of appeals held that the prosecutor's comment that petitioner and Gutirrez were ready to make a sale was a "permissible interpretation by counsel from the testimony that was properly before

the jury" (Pet. App. 3). The evidence showed that the officers knew someone in a green 1965 Chrysler would meet the persons waiting in the parked Buick. Petitioner and Gutirrez arrived in a green 1965 Chrysler, stopped, sped away, and were apprehended with narcotics. The prosecutor's comment was merely a permissible inference drawn from the defendants' acts.

With respect to the comment by the prosecutor in his opening statement that the occupants of the Buick were addicts,[2] we point out that the comment was neither repeated nor referred to during the remainder of the trial. Thus, the court of appeals held, in light of the explicit charge to the jury that statements of lawyers are not evidence (Tr. 183–184) and a similar admonition in that regard by the prosecutor himself (Tr. 3), that the comment did not require a mistrial.

The cases cited in the petition (Pet. 8–13) as demonstrative of a conflict among the circuits are distinguishable, as the court of appeals held (Pet. App. 3–4; see Pet. 8). Each involved a comment or misconduct of obvious prejudicial character, *e.g.*, repeated references to an immaterial fact that a defendant on trial for possession of narcotics stored the drugs in a child's dresser drawer, thereby evincing a "reckless disregard of the welfare of chil-

[2] The prosecutor's other remark—that agent Coulter and another officer had long experience in the narcotics enforcement field—was unobjectionable. It was later supported by the testimony of the two men, to which no objection was made; indeed, a witness may always indicate his background and employment.

dren * * *."[3] It is evident, moreover, that each case in which it is asserted that an allegedly improper comment prejudiced the defendant must be judged by its particular circumstances. We think it clear that no issue warranting review by this Court is presented by the determination below that petitioner was not prejudiced by the comments here questioned.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, Jr.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

NOVEMBER 1966.

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[3] *United States* v. *Bugros*, 304 F. 2d 177, 178 (C.A. 2). Petitioner also relies on *Towbin* v. *United States*, 93 F. 2d 861 (C.A. 10). But in that case the prejudicial quality of the prosecutor's misconduct was also manifest. The prosecutor on direct examination of narcotics agents solicited the information that the office of the defendant physician had been under surveillance, and that two named narcotics addicts, who had recently pleaded guilty, had frequented the doctor's office. That improper line of questioning obviously reflected upon the defense that the doctor had merely administered drugs lawfully to his *bona fide* patients.

U. S. GOVERNMENT PRINTING OFFICE: 1966